already from the point of view of the prosecution as to ownership.

The third ground of appeal was that when O.D.O., Lim Pah Bah, was offered for cross-examination he was interrogated by the learned District Judge before the defence cross-examined, and that it was this interrogation which brought out the evidence as to the accused locking up the hut, evidence which admittedly was of weight in the consideration of the case by the learned District Judge.

While I lean to the opinion that it would have been more correct for the trial Judge to postpone his interrogation till after the cross-examination and re-examination, if any, of such a witness, it is open to the trial Judge to question any witness in the interests of justice, and it is clear from the statement made by the accused to the Asst. Superintendent of Customs (P.B.) on 29th May, 1948 and recorded by him and put in evidence as P.9 that accused then admitted that he had the key of the hut. I therefore hold that the procedure followed by the trial Judge did not in any way harm the accused's case or embarrass him.

As to the contention that the analyst's certificate was inadmissible in evidence as not having been proved, I have already ruled in a previous case that a certificate of this nature (P.8.) is admissible in evidence.

The learned District Judge held rightly that the prosecution evidence threw the onus of proving dispossession of the chandu and smoking implements on the accused and it is clear that the accused made no attempt to discharge that onus.

For these reasons the appeal is dismissed and the conviction and sentence must stand.

Appeal dismissed.

SELVADURAI v. PUBLIC PROSECUTOR

[A. Cr. J. (Callow J.) September 17, 1948]

[Seremban — Criminal Appeal No. 10 of 1948]

Evidence Ordinance, s. 24 — Confession — Inducement — Admissibility or rejection.

In this case the appellant was convicted for forgery. On appeal it was argued that the confession by the appellant, which was admitted at the trial, should not have been received in evidence because it was obtained by inducement.

Held: (1) although at the time he made the inculpatory statement the appellant had not been accused, it is sufficient to cause the operation of s. 24 of the Evidence Ordinance if the ultimate outcome is a charge based upon the inculpatory statement; (2) very slight inducement is sufficient to render a statement inadmissible; (3) when it is proposed to tender a confession it should not be proffered at the opening of the case as a preliminary issue, but a foundation should first be laid.

Cases referred to :—

(1) *R. v. Cowell* 27 Cr. App. R. 191.
(2) *Emperor v. Cunna* A.I.R. 1920 Bom. 273.
(3) *R. v. Garner* 2 C. & K. 925.
(4) *R. v. Manfield* 14 Cox C.C. 640.
(5) *R. v. Thomas* 7 C. & P. 345.
(6) *R. v. Reason* 12 Cox C.C. 228.
(7) *R. v. Hammond* 28 Cr. App. R. 84.

MAGISTRATE'S CRIMINAL APPEAL.

R. S. Rajasooria for the appellant.

D. W. Good (D. P. P.) for the respondent.

Callow J. : — This is an appeal from the Court of the District Judge, Negri Sembilan, sitting at Port Dickson, against the conviction and sentence of three months rigorous imprisonment imposed on the 29th of June, 1948, for forgery.

The grounds of appeal, apart from (c) which concerns weight of evidence and was not mentioned in argument, and (d) against sentence, consist of the submission that the admission or confession by the appellant that he signed the document Ex. P. 5 should not have been received in evidence because it was obtained by inducement, threat or promise.

The facts are that on the 20th of March, 1948, a meeting was held in the office of the 1st prosecution witness (Mr. C. H. O. Strettell who is the Manager of the Jimah Estate) at which were present a number of persons including the accused. The meeting resulted from a petition by certain employees alleging under payment.

During the meeting it transpired that the receipt P. 5 purported to have been signed by the 4th prosecution witness (Singaram) was not signed by him nor had he received the money stated therein. The case for the prosecution is that the appellant signed and thereby forged Ex. P. 5.

The record on this point taken from the evidence of the 1st prosecution witness Mr. Strettell reads :—

I said to Singaram 'Did you sign this receipt'. The answer was 'I can neither read nor write'. I asked accused 'Did you hear that'. He said 'Yes'. I said 'Who signed it'. He said 'I did'. On the question of this receipt before I said 'Who signed it' I did not say anything else in the nature of a threat.

Then in cross-examination and re-examination of the same witness (1 P.W.) there come these further passages :—

Cross-examination:— In the course of the meeting there were a number of allegations brought against the accused. It may be said I was holding an enquiry. I think at the beginning of the enquiry I told him to tell the truth. I was anxious to get to the bottom of this and I wished to find out if allegations made against accused were well founded or not. For that reason I

questioned him. I may have said it was to his advantage to tell the truth. I was certainly friendly and I think I may have given the impression that if he were honest with me I would overlook any offence.

Re-examination:— I advised the accused to speak the truth. If he did not speak the truth I think I suggested that the consequences might be serious. He answered my question with regard to signing the receipt without hesitation. At no stage did he deny having signed the receipt.

Then the 5th prosecution witness Gomez said :—

I am a Conductor on Jimah Estate. Accused (identified) was the office clerk on that estate. On 20th March 1948 I went to the estate office in the morning. W.P. 1 (identified), Mr. Raj (identified), W.P. 4 (identified) and accused were present. The Manager had received a petition and we were there to investigate a petition sent by the labourers. Exhibit P. 5 was a document that was discussed. W.P. 1 asked W.P. 4 if he had received any money from accused. W.P. 4 said he had received $25/- advance and $15/- in respect of recruiting money. W.P. 1 asked him about Exhibit P. 5 and W.P. 4 said he had not received $85/- and moreover he could not read or write. Then W.P. 1 asked the accused 'You have heard what W.P. 4 has said, what have you to say'. Accused said 'I signed it'. The conversation was carried on about other matters. W.P. 1 spoke in English to accused.

Cross-examination:— On 16.3.48 there was an enquiry into the petition. The manager asked me to be present. He asked the accused what it was all about. He did not tell him to speak the truth as it would be better for him.

* * * * * *

On 20.3.48 accused said 'I have signed the receipt' when the manager turned to him after W.P. 4 said he could neither read nor write. Manager did not warn accused to speak the truth. He did ask accused to speak the truth. The manager was very kind. He suggested anyone of us might have done it. Accused said he did it.

The above are relevant extracts from the record and illustrate the circumstances under which the appellant admitted signing Ex. P. 5. Nowhere is there any suggestion that the accused *did* not sign the receipt P. 5. It was not suggested in cross-examination, and on the argument as to admissibility when the accused could have given evidence (*R. v. Cowell*[1]) his Counsel (Mr. Rajasooria who represented the accused at the trial in the Court below) stated here that he accepted procedural responsibility. Nor did the accused elect to refute, rebut or explain the evidence when called upon for his defence. The confession was never retracted.

It was, in fact, hardly a confession in the generally accepted term; it was an inculpatory statement from which the inference of guilt was drawn (*Woodroffe & Ameer Ali on Evidence,* 9th Edn., page 226). But it is clear from the reported case of *Emperor v. Cunna*[2] that although at the time the appellant had not been accused, it is sufficient to cause the operation of section 24 of the Evidence Ordinance if the ultimate outcome is a charge based upon the inculpatory statement. Indeed in this case the facts seem even closer; according to Mr. Strettell (1 P.W.) in cross-examination the inquiry was to find out if the allegations against the accused were well founded or not. It would seem that suspicion had been attached to him, and looking at the evidence from that angle it is clearly a confession which was tendered (*Phipson on Evidence,* 9th Edn. page 248).

Now the learned District Judge, from the grounds of judgment, did not approach the evidence from the view point of section 24 of the Evidence Ordinance. He held that because at the time the accused made the statement no charge had been preferred, therefore section 24 did not apply.

It is on this ground that the inculpatory statement was admitted. What would have been the decision in the Court below had section 24 been considered?

The learned Deputy. Public Prosecutor at once appreciated correct law, and while supporting the conviction would not support the reasoning whereby the inculpatory statement had been admitted. Mr. Good, conceded very properly that section 24 of the Evidence Ordinance did apply. He then drew particular attention to the precise wording of the section, especially the lines I have underscored :—

A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession *appears to the Court* to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient *in the opinion of the Court* to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

In this case it is common ground that in relation to the accused Mr. Strettell (1 P.W.) was a person in authority, and the question the Court below should then have addressed itself to is in the terms of section 24 set out above.

I am not inclined to go the whole way with Mr. Rajasooria in his able argument for the appellant and to agree that a mere admonition to speak the truth addressed to a person during the course of an inquiry, no charge being at the time preferred, nor the person in custody, renders *ipso facto* any statement of an inculpatory nature inadmissible. But it has certainly been for long held that an exhortation such as "You had better tell the truth" and equivalent expressions are regarded as having acquired a fixed meaning, as if a technical term, and are always held to import a threat or promise (*Woodroffe & Ameer Ali on Evidence,* 9th Edition, pages 283/4). Very slight inducement is sufficient to render a statement inadmissible (*R. v. Cowell*[1]).

It is not manifest from the record when the observations of a cautionary nature occurred; they were probably spoken at the beginning of the inquiry, and then it becomes a matter for consideration if the appellant's answer to Mr. Strettell's question as to

whether he had signed Ex. P. 5 followed sufficiently closely for those cautionary words to operate on the appellant's mind.

If indeed an inducement was held out then the second part of section 24 comes into play, and it has been said that the proper question is whether the inducement was calculated to make the inculpatory statement an untrue one (*Archbold*, 29th Edition, page 393). Was the appellant placed in a position whereby he might rightly or wrongly conceive that it would be better for him to confess that he had committed a crime, or worse for him if he did not (*R. v. Garner*[3]).

It is the truth that is always sought. It is not because the law is afraid of having the truth elicited that confessions may be excluded, but because the law is jealous of not having the truth (*R. v. Mansfield*[4]). The only proper question is whether any inducement was held out calculated to make the accused's statement untrue (*R. v. Thomas*[5]). Was there a threat or promise of such nature that the accused was more likely to tell an untruth from fear, or hope of profit from any promise (*R. v. Reason*[6]).

I have elaborated the law because I think it well to take this opportunity to illustrate and explain the position in connection with the admissibility or rejection of confessions.

It may also be convenient here to mention that when it is proposed to tender a confession it should not be proffered at the opening of the case as a preliminary issue, but a foundation should first be laid (*R. v. Hammond*[7]). Then evidence may be adduced by the prosecution averring the propriety and legality of the procedure and circumstances whereby the confession was given, and the accused may himself be called as a witness on the issue of admissibility if the justice of the case makes it desirable that this should be done (*R. v. Cowell*[1]). It almost forms a small trial within a trial, and needless to say should the case for the prosecution be opened the prosecuting officer ought not, if the defence is likely to object to the statement to be tendered, make reference to it (*R. v. Hammond*[7]).

In this case it cannot be surmised what decision the learned District Judge would have arrived at if the evidence had been examined from the principles of section 24 of the Evidence Ordinance nor, had procedure followed that which I have outlined above, whether the defence would have been conducted in a different manner. Learned Counsel for the accused was certainly in a strong position when he advised the accused not to give evidence once it was appreciated that the Court intended to disregard section 24 of the Evidence Ordinance — if indeed it was so appreciated, for there is no precise reference to this point in the record of evidence, and it is not apparent until the grounds for judgment are perused.

I am doubtful whether the appellant has suffered any miscarriage of justice, a *prima facie* case of crime appears on the record which should be prosecuted, but I cannot sustain a conviction based on a confession admitted by the Court below wrongly holding it was *not* to be a confession governed by the principles contained in section 24 of the Evidence Ordinance, the consequence of which may have had effect on the accused's election when called on for the defence. It must receive consideration on what it is — an inculpatory statement amounting to a confession.

I shall therefore order retrial. The hearing must commenced *de novo*, and, in the event of the inculpatory statement being tendered and objected to, the learned District Judge should, if the evidence is similar to that in the record of this appeal, direct himself on the principles contained in and arising from section 24 of the Evidence Ordinance.

The conviction and sentence of the Court below is set aside and retrial is hereby ordered.

Retrial ordered.

CHONG CHEE PAK v. PUBLIC PROSECUTOR.

[A. Cr. J. (Callow J.) September 17, 1948]

[Seremban — Criminal Appeal No. 11 of 1948]

Common Gaming Houses Enactment (Cap. 47) s. 4(i)(c) — Charge of "assisting in the management of a public lottery" — Nullity — Criminal Procedure Code (Cap. 6), ss. 156 and 173(a).

In this case the appellant was convicted on a charge of "assisting in the management of a public lottery." On appeal it was argued that the decision was wrong in law in that the appellant was found guilty on a charge which did not disclose an offence known to law.

Held: (1) there is no such offence under s. 4(i)(c) of the Common Gaming House Enactment as "assisting in the management of a public lottery" and therefore the conviction in this case was a nullity; (2) as the proceedings in the Court below were a nullity, a retrial could not be ordered.

Obiter: In the event of further proceedings, a plea of *autrefois convict* would be unavailing, for the appellant had not been in peril.

Cases referred to:—

(1) *R. v. Chong Ah Pye* 4 Ky. 597.

(2) *Lee Seow Kuan v. Rex* (1940) M.L.J. 211.

(3) *Pek Tin Shu v. Public Prosecutor* (1948) M.L.J. 113.